

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF IDAHO**

<b>IN RE</b>	)	
	)	<b>Case No. 98-02184</b>
MICHENER, JERRY R., an	)	
individual, and MICHENER,	)	
MARY C., an individual, dba	)	<b>MEMORANDUM OF DECISION</b>
M. MICHENER & ASSOCIATES,	)	
INC., fdba IDAHO UGGLIES,	)	
fdba MICHENER	)	
ENTERPRISES, and fdba	)	
MICHENER PROPERTIES,	)	
	)	
<b>Debtors.</b>	)	
_____	)	

D. Blair Clark, RINGERT, CLARK, Boise, Idaho, for Debtors.

G. Kent Taylor, TARA MARTENS, Twin Falls, Idaho, for Gem State Realty.

Jed W. Manwaring, EVANS, KEANE, Boise, Idaho, for Trustee Bernie Rakozy.

Jeffrey G. Howe, Assistant U.S. Trustee, Boise, Idaho.

**Background.**

On December 18, 1998, Gem State Realty, Inc. ("Gem State") filed a Motion to Direct Payment for Realtor Fees in this case, seeking payment of \$7,470 from the proceeds of the sale of certain real estate owned by the

bankruptcy estate. The Chapter 7 Trustee and the U.S. Trustee objected to the motion. Following a January 5, 1999 hearing, the matter was taken under advisement.

### **Facts.**

There are no disputed facts. On June 30, 1998, Debtors Jerry and Mary Michener filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code. Debtor Jerry Michener was employed as a real estate agent working for Remax Keystone Realty ("Remax").

On July 23, Debtors entered into an agreement with Joseph Ippolito Sr. and Joseph Ippolito Jr. ("Ippolitos") to sell them Debtors' office building located in Twin Falls, Idaho for \$249,000. The agreement provided that Remax was the listing agency, with Michener designated by the agreement as the listing agent. Gem State was the selling agency.

On the same day, Ippolitos executed an "Exclusive Buyer Representation Agreement" with Gem State providing that they would be obligated to pay a 3% fee to Gem State upon a successful closing. Under the agreement, Gem State was authorized to request payment of its fee from the

seller. In the event that the seller did not pay the fee, however, the agreement provided that Gem State would look to the Ippolitos as buyers for payment.

On August 31, 1998, Debtors filed a notice of their intention to sell the property to Ippolitos with the Court. On September 25, Debtors filed a Motion to Pay Real Estate Fees seeking an order allowing payment of a commission to both Remax and to Gem State from the sale proceeds.

On October 13, 1998, the Court conducted a hearing on approval of the sale and on Debtors' motion to pay the commissions. After considering the arguments of the Debtors and U.S. Trustee, the Court approved the sale and the payment of closing costs and real estate taxes associated with the sale. However, because no realtor employment had been authorized by the Court, the Court directed that the remaining sale proceeds be held in trust by Debtors' attorney pending further order of the Court. In this fashion, any issue regarding payment of the real estate commissions was reserved for later disposition by the Court.

The property sale closed on December 4. The Settlement Statement provided for a realtors' commission of \$14,940 (i.e. 6% of \$249,000) half (\$7,470) payable equally to Gem State and Remax. This money is held in trust.

On motion of a creditor, Debtors' case was converted from Chapter 11 to Chapter 7 on December 11.<sup>1</sup> Remax has not sought payment of a commission. On December 18, Gem State filed its motion seeking payment of a 3% realtor commission from the sale proceeds, amounting to \$7,470.

## **Discussion**

Normally, a Chapter 11 debtor's realtor must apply to the Court for approval of its employment under Section 327(a) as a condition of being paid a commission from the sale of the debtor's property. 11 U.S.C. § 327(a); § 330(a). Gem State argues, however, that because it did not represent Debtors in the sale, the Bankruptcy Code provisions requiring prior Court approval of its employment should not apply. Alternatively, Gem State argues that if the commission is not paid, the bankruptcy estate will be unjustly enriched.

Section 327 governing employment of professional persons by a Chapter 11 debtor in possession provides that:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers,

---

<sup>1</sup> While not relevant to the issues before the Court here, the case was converted by the Court because, in part, in September, 1998, Debtor Mary Michener was found guilty in U.S. District Court of thirty counts of fraud related to the operation of her business. She was later incarcerated.

or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a). Compliance with this rule is critical to those providing professional services to trustees and debtors in possession since “[i]n bankruptcy proceedings, professionals who perform services for a debtor in possession cannot recover fees for services rendered to the estate unless those services have been previously authorized by a court order.” *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 973 (9th Cir. 1995).

In this case, Gem State admittedly did not represent the Debtors, and therefore, there was no requirement that it apply for approval of its employment as a professional. This observation should be of little comfort to Gem State, though, since it does not necessarily follow that Gem State is entitled to a commission from the proceeds of the sale of the property of the bankruptcy estate.

Gem State’s entitlement to a commission arises from either of two contracts. On the one hand, both Gem State and Remax are members of the local Multiple Listing Service through which Debtors’ property was listed and advertised. Under the agreement of the participating members, Remax, as the

listing agency, agrees to share with the buyers' realtors any commission it is to receive from the sellers.<sup>2</sup> On the other hand, Gem State has a contract with its clients indicating that if Gem State is not able to obtain its fee from the sellers' realtors, the buyers agree to pay Gem State a commission. Since Gem State has no contract with the Chapter 11 Debtors, it has no right to a commission from the Debtors as sellers enforceable in this bankruptcy case. Presumably, Gem State may look to Remax or Ippolitos for payment of its commission.

Realtors may not simply appear in the bankruptcy courtroom seeking commissions from sale of bankruptcy estate property without prior approval of their involvement. In a case with similar facts, the Ninth Circuit affirmed the bankruptcy court and Bankruptcy Appellate Panel in holding that a real estate agency that procured the eventual buyer of the debtor's property was precluded from obtaining compensation from the bankruptcy estate because of its failure to comply with the approval requirements of Section 327. *Land West, Inc. v. Coldwell Banker Commercial Group, Inc. (In re Haley)*, 950 F.2d 588 (9th Cir. 1991). Land West, a real estate agency, sought payment of a commission

---

<sup>2</sup> No application to approve Debtors' employment of Remax was filed with the Court. Since Debtor Jerry Michener was employed by Remax, and was actually designated as the listing agent in this listing, it is doubtful that Remax was "disinterested," as that term is defined in 11 U.S.C. § 101(14), and therefore eligible for employment under Section 327(a) to work for the Chapter 11 Debtors in the bankruptcy case.

for producing the buyer in a sale that brought over \$17 million into the bankruptcy estate. The court, however, held that Land West could not “emerge out of the blue” to receive a commission without prior court approval. *Id.* at 590.

The court explained that:

Control by the bankruptcy court is necessary to enable the court to contain the estate's expenses and avoid intervention by unnecessary participants. "The purpose of the rule requiring prior court authorization of a professional's appointment is to eliminate volunteerism and thus aid the court in controlling estate administrative expenses."

*Land West*, 950 F.2d at 590 (citing *In re Willamette Timber Sys.*, 54 B.R. 485, 488 (Bankr. D. Ore. 1985)). In sum, professionals may not generally recover compensation for a sale of property of a bankruptcy estate without prior approval of their services by the Bankruptcy Court.<sup>3</sup>

---

<sup>3</sup> Arguably, compensation for professional services could be allowed as an expense of administration of the bankruptcy estate under 11 U.S.C. § 503(b)(1)(A) if those services were necessary to preserve the property of the bankruptcy estate. However, the courts have held that Section 503(b) cannot be used as an end run around the failure of a professional to seek prior approval of its employment under Section 327. *McCutchen, Doyle, Brown & Enersen v. Official Committee of Unsecured Creditors (In re Weibel, Inc.)*, 176 B.R. 209, 212-23 (9th Cir. B.A.P. 1994). Compare *In re Corporate Image, Inc.*, 95 I.B.C.R. 24, 25 wherein this Court allowed a “finders fee” under Section 503(b) to an individual for locating a buyer of the Chapter 11 debtor's business equipment based upon the conclusion that the individual was not a “professional”. Realtors, on the other hand, are clearly professionals for purposes of Section 327(a). *United States Trustee v. Bloom (In re Palm Coast)*, 101 F.3d 253, 257 (2nd Cir. 1996); *Land West, Inc. v. Coldwell Banker Commercial Group, Inc. (In re Haley)*, 950 F.2d 588 (9th Cir. 1991).

In the alternative, Gem State argues that equity requires its commission be paid since otherwise the bankruptcy estate is unjustly enriched. "As a general rule the equitable remedy of quantum meruit cannot be available where the fees are barred by law under the bankruptcy rules." *Halperin v. Occidental Financial Group, Inc. (In re Occidental Financial Group, Inc.)*, 40 F.3d 1059, 1063 (9th Cir. 1994). In this arena, Congress has dictated the applicable equities, and the Court should not interfere. If such were not the rule, any unapproved professionals could assert an equitable claim to compensation.

As discussed above, it also appears likely that Gem State has contractual rights to seek payment of the commission from Remax, the listing agency, and from the Ippolitos, the buyers. The Court is not inclined to invoke equitable remedies when an adequate alternate remedy at law exists.

### **Conclusion.**

For the reasons set forth above, Gem State's motion seeking payment of realtor commissions will be denied by separate order.

DATED This \_\_\_\_\_ day of March, 1999.

---

JIM D. PAPPAS  
CHIEF U.S. BANKRUPTCY JUDGE



CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Jeffrey G. Howe, Esq.  
Office of the U.S. Trustee  
P. O. Box 110  
Boise, Idaho 83701

D. Blair Clark, Esq.  
RINGERT, CLARK  
P. O. Box 2773  
Boise, Idaho 83701

G. Kent Taylor, Esq.  
TARA MARTENS  
P. O. Box 1901  
Twin Falls, Idaho 83303

Jed W. Manwaring, Esq.  
EVANS, KEANE  
P. O. Box 959  
Boise, Idaho 83701

Bernie Rakozy  
P. O. Box 1738  
Boise, Idaho 83701

CASE NO.: 98-02184

CAMERON S. BURKE, CLERK  
U.S. BANKRUPTCY COURT

DATED:

By \_\_\_\_\_  
Deputy Clerk